UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 16-3076 and 16-3570

Caption [use short title]

Motion for: To Supplement the Record

Novelis Corporation v. National Labor Relations Board
and
Novelis Corporation v. National Labor Relations Board

Set forth below precise, complete statement of relief sought:

Employee Intervenors move for permission to supplement the official record with Employee Intervenors' Memorandum of Law In Support of Exceptions to the Decision of the Administrative Law Judge

MOVING PARTY: John Tesoriero, Michael Malone, Richard Farrands and Andrew Duschen (Employee Intervenors)
☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: N/A

MOVING ATTORNEY: Thomas G. Eron, Esq.
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Court-Judge/Agency appealed from: National Labor Relations Board

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

Date: 5/22/2017

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOVELIS CORPORATION,

Petitioner/Cross Respondent,

Docket No. 16-3076

JOHN TESORIERO, MICHAEL MALONE, RICHARD FARRANDS AND ANDREW DUSCHEN,

Docket No. 16-3570

Intervenors,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC,

Intervenor.

EMPLOYEE INTERVENORS'
MOTION TO SUPPLEMENT THE RECORD

Pursuant to Rules 10(e) and 27 of the Federal Rules of Appellate Procedure and Local Rule 27.1, John Tesoriero, Michael Malone, Richard Farrands, and Andrew Duschen (collectively, "Employee Intervenors"), move for permission to

supplement the record with the Employee Intervenors' Memorandum of Law in Support of Exceptions to the Decision of the Administrative Law Judge. (A copy of this Memorandum of Law is attached hereto as *Exhibit A*). The basis for the motion is set forth below.

1. On April 27, 2017, Employee Intervenors submitted to this Court a Reply Brief in Support of Novelis Corporation's Petition for Review of NLRB Decision and Order ("Reply Brief"). Dkt. No. 165.
2. In this Reply Brief, Employee Intervenors cited to a Memorandum of Law in Support of Exceptions to the Decision of the Administrative Law Judge, which Employee Intervenors submitted to the National Labor Relations Board (the "Board") in the earlier Board proceeding.
3. It has been brought to Employee Intervenors' attention that their Memorandum of Law in Support of Exceptions to the Decision of the Administrative Law Judge is not part of the official record, as the Board does not consider post-hearing briefs as part of its official record.
4. Employee Intervenors' Memorandum of Law in Support of Exceptions to the Decision of the Administrative Law Judge should be included in the record before this Court, as the memorandum is material to an argument that was raised in briefing before this Court.

5. Specifically, the Board has asserted that Employee Intervenors did not properly raise the card authenticity issue before the Board.
6. To refute this contention, Employee Intervenors, in their Reply Brief, rely upon their Memorandum of Law in Support of Exceptions to the Decision of the Administrative Law Judge, wherein the issue of card authenticity was raised.
7. Accordingly, Employee Intervenors submit that this Memorandum of Law in Support of Exceptions to the Decision of the Administrative Law Judge is material to an issue before this Court and seek permission of this Court to include the memorandum in the official record.
8. On May 16, 2017, Employee Intervenors notified the other parties in this matter of their intent to file this Motion to Supplement the Record. Petitioner/Cross-Respondent Novelis Corporation, Respondent Cross-Petitioner National Labor Relations Board and Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC do not oppose this Motion and will not be filing a response.

WHEREFORE, for good cause shown, Employee Intervenors respectfully request that this Motion be granted.

Dated: May 22, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas G. Eron, Esq., do hereby certify that on May 22, 2017, an electronic copy of John Tesoriero, Michael Malone, Richard Farrands, and Andrew Duschen's (collectively, "Employee Intervenors") Motion to Supplement the Record was filed with the Court via the CM/ECF system and that I have completed the service section in CM/ECF when filing said Motion listing the following Filing Users:

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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NOVELIS CORPORATION
Employer

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS, INTERNATIONAL UNION, AFL-CIO

Petitioner

Cases 03-CA-121293
03-CA-121579
03-CA-122766
03-CA-123346
03-CA-123526
03-CA-127024
03-CA-126738

NOVELIS CORPORATION
Employer

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS, INTERNATIONAL UNION, AFL-CIO

Petitioner

Cases 03-RC-120447

INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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PRELIMINARY STATEMENT

Intervenors John Tesoriero, Michael Malone, Richard Farrands and Andrew Duschen (the "Intervenors"), employees of Novelis Corporation ("Novelis"), submit this Memorandum of Law in support of their Exceptions to the Decision of the Administrative Law Judge dated January 30, 2015 ("ALJ Decision").

The Intervenors, along with a majority of their coworkers, voted against representation by Petitioner, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Union") in a secret ballot election conducted by the National Labor Relations Board ("NLRB" or the "Board") in February 2014. Given the evidence before the Board establishing that the Novelis employees are mature and experienced, that they had access to considerable information from many sources, not just Novelis and the Union, and that there was informed, open debate and discussion, over an extended period of time, on the merits of union representation generally and representation by this Union, in particular, because the leadership of the Union is well known in Oswego, NY, the Intervenors maintain that the election results should be upheld, as reflecting the true intentions of the Novelis employees.

Alternatively, if the Board were to accept some or all of the ALJ's findings that Novelis engaged in unfair labor practices, the Board must, nonetheless, reject the ALJ's recommendation for the "extraordinary remedy" of a bargaining order – that would impose union representation upon a majority of the Novelis employees against their express wishes. The General Counsel has failed to demonstrate that traditional remedies, such as a cease and desist order, notice posting and other communication

remedies, and a re-run election would be ineffective. This is particularly true when one considers that a federal court 10(j) injunction has been in place since September 2014, which imposed all of the relief sought by the General Counsel (except a bargaining order) on Novelis pending final Board action, and which was directly communicated to all employees as required by the Court.

On this record, the issuance of a bargaining order is clearly inappropriate because traditional remedies are sufficient to rectify any effects of alleged misconduct. The conduct was not so pervasive or severe as to render traditional remedies insufficient to reestablish the laboratory conditions necessary for a fair election, and allow the employees to determine whether or not representation by the Union is in their best interests.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2013, the Union began an organizing drive at Novelis' Oswego, New York facility which involved approximately 599 production and maintenance employees. ALJD at 41.[1] The Union had no relationship with Novelis employees prior to its organizing campaign. The Union filed a representation petition with the Board on January 13, 2014 seeking to represent these employees. (GC Ex. 1(a)). Accordingly, the Board conducted a secret ballot election on February 20 and February 21, 2014. ALJD at 41. During the election, a majority of employees voted against Union representation. ALJD at 1-2, 42.

[1] References to the ALJ Decision are cited herein as "ALJD __." References to the hearing transcript are cited as "Tr. __." The General Counsel's exhibits are referred to as "GC Ex. __", Novelis' exhibits are referred to as "R. Ex. __", and the Intervenors' exhibits are referred to as "I. Ex. __".

The Union filed numerous objections and unfair labor practice charges. ALJD at 42. The Regional Director ultimately issued a series of complaints leading to the present proceedings. *Id.* In the operative Complaint, the General Counsel contends that Novelis committed various unfair labor practices and seeks extensive relief, including the imposition of a bargaining order, in lieu of a second election. *See* Second Consolidated Complaint pp. 9-10. (GC Ex. 1(cc)). A seventeen (17) day hearing was held between July 2014 and October 2014 before Administrative Law Judge Michael Rosas ("Judge Rosas") of the NLRB. ALJD at 1. During this proceeding, evidence was presented by the General Counsel and Novelis. The Intervenors were permitted to cross-examine witnesses, raise objections, and summit legal briefings.[2]

On June 25, 2014, approximately three weeks before the NLRB hearing was scheduled to begin, the Regional Director filed a petition on behalf of the Board in federal court seeking temporary injunctive relief pursuant to Section 10(j) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j). *Ley v. Novelis Corp.*, 2014 U.S. Dist. LEXIS 123059, at *1 (N.D.N.Y. Sept. 4, 2014) (referred to herein as the "10(j) Proceeding"). In this petition, the Regional Director sought a cease and desist order, an order restoring a Novelis employee, Everett Abare, to a position from which he had

[2] In addition to voting in the election, the Intervenors have engaged in further concerted activity to ensure that their voices and the voices of their co-workers were heard. To that end, Intervenors circulated two petitions among their co-workers regarding their opposition to the outsider Union, the first petition was presented to employees who were eligible to vote in the election, and the second petition was addressed to employees who were hired after the secret ballot election. *See* Farrands Decl., I. Ex. 2 at ¶¶ 9-10 and Exs. A & B; *see also* Malone Decl., I. Ex. 2 at ¶¶ 9-10. The first petition, signed by 200 employees, confirms that the election was conducted in a fair and impartial manner and that the employees were in no way coerced, threatened or intimidated by any conduct, action or statement made by any Novelis official. *See* Farrands Decl., I. Ex. 2 at ¶ 9, and Ex. A; Malone Decl., I. Ex. 2 at ¶ 9). Collectively, the petitions also reiterate that Intervenors and their co-workers oppose the Union and do not wish to be represented by the Union for any purpose. *See* Farrands Decl., I. Ex. 2 at ¶¶ 9-10; Exs. A & B; Malone Decl., I. Ex. 2 at ¶¶ 9-10.

been demoted, as well as other substantial interim remedies. *Id.* at *1-2. The Regional Director also requested a bargaining order requiring Novelis to recognize and bargain in good faith with the Union. *Id.* at *1.

In a decision dated September 4, 2014, the Court refused to issue a bargaining order, but ordered other substantial interim relief as requested by the Regional Director, including enjoining Novelis from engaging in the myriad of alleged Section 8(a)(1) conduct. The Court also ordered certain affirmative actions, including:

> (a) Restoring Everett Abare to the position that he previously held at his previous wage and other terms and conditions of employment;
>
> (b) Posting copies of the court's order at Novelis' Oswego, New York, facility where notices to employees are customarily posted, those postings to be maintained during the pendency of the NLRB's administrative proceedings free from all obstructions and defacements such that all employees have free and unrestricted access to the notices;
>
> (c) Granting to NLRB agents reasonable access to Novelis' Oswego facility in order to monitor compliance with this posting requirement; and,
>
> (d) Convening the bargaining unit employees during working time at Novelis' Oswego facility, at times and places scheduled to ensure maximum possible attendance, whereupon Phil Martens or Chris Smith, in the presence of an NLRB Agent, was directed to read the court's order to all employees.

Id. at *18-22. Novelis fully complied with this Order, including holding multiple employee meetings on September 11 and 12, 2014 at which Plant Manager Chris Smith read the Court's order as directed.[3] ALJD at 46.

[3] The Board should take judicial notice of the Affidavit of Compliance filed in the 10(j) Proceeding by Kenneth L. Dobkin, Senior Counsel for Novelis Corporation, on September 29, 2014. *See Ley v. Novelis Corp.*, Case No. 5:14-cv-775, Dkt. No. 75-1.

On January 30, 2015, the ALJ issued his decision in which he found Novelis to have violated Section 8(a)(1) by threatening employees, granting wage and benefits increases, disparaging the Union, interrogating employees about their union membership, soliciting grievances, maintaining overly broad no solicitation rules, and selectively enforcing those rules. *See* ALJD at 69-71. He also found Section 8(a)(1) and (3) violations in the demotion of Everett Abare two months after the election. *Id.* at 71. The ALJ recommended reinstatement of Abare and a cease and desist order.[4] *Id.* at 72-73. He found that Novelis' conduct invalidated the February election. Instead of ordering a re-run election that would allow the employees to decide their own fate, he recommended the issuance of a bargaining order based on his conclusions that (i) the Union had established majority status through authorization cards and (ii) Novelis' conduct "strongly suggests that the lingering effect of these violations is unlikely to be eradicated by traditional remedies." ALJD at 67.

We leave to the General Counsel and Novelis the task of describing in detail the proof relating to the alleged unfair labor practices. This Brief focuses on the potential remedy issues that impact the employees' Section 7 rights to freely choose their own bargaining representative.

[4] This relief was already in place pursuant to the 10(j) injunction.

ARGUMENT

POINT ONE

The NLRB Must Honor and Protect The Employees' Right to Reject The Union as Expressed in The February 2014 Election

The fundamental right of employees to select or reject union representation is the paramount interest protected by the NLRA. *See Rollins Transp. Sys.*, 296 NLRB 793, 794 (1989) ("employees' Section 7 rights to decide whether and by whom to be represented" is the overriding interest of the NLRA). In fact, in representation proceedings, the NLRA is not intended to protect unions or employers. The statute is intended to protect employees. *See Levitz Furniture Co.*, 333 NLRB 717, 728 (2001) ("it is the employees' Section 7 right to choose their bargaining representatives"; employer's only statutory interest in representational matters is to ensure they do not violate employee rights); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) ("[b]y its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers"). Any interests advanced by the General Counsel, the Union, or Novelis are merely secondary to the interests of the Intervenors and their fellow employees.

The U.S. Supreme Court has definitively established that "secret elections are generally the most satisfactory -- indeed the preferred -- method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 602 (1969). As such, "representation elections are not lightly set aside." *Trump Marina Assocs.*, 353 NLRB 921, 927 (2009); *Quest International*, 338 NLRB 856 (2003); *Safeway, Inc.*, 338 NLRB 525 (2002); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325,

328 (5th Cir. 1991). In fact, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lucky Cab Company*, 360 NLRB No. 43, slip op. at 21 (2014) (*quoting NLRB v. Hood Furniture Mfg. Co.*, *supra*, 941 F.2d at 328), and the burden of proving that a Board-supervised election should be set aside is a "heavy one" which the General Counsel must carry. *Id.*; *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (*citing Harlan # 4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir.), *cert. denied,* 416 U.S. 986 (1974)).

Where, as here, the General Counsel seeks a bargaining order, in lieu of a second election to remedy alleged unfair labor practices, the burden on the General Counsel is far heavier because the risk to the employees Section 7 rights is far more severe. The Supreme Court has held that "[t]here could be no clearer abridgment of § 7 of the Act, assuring employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity" than "in grant[ing] exclusive bargaining status to an agency selected by a minority of its employees, thereby imposing that agent upon the nonconsenting majority. . . . ." *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961).

A bargaining order is an extraordinary and drastic remedy that must only be imposed in rare, limited circumstances. *Desert Aggregates*, 340 NLRB 289, 289 (2003) ("A *Gissel* order is an extraordinary remedy … the preferred route is to provide traditional remedies for an employer's unfair labor practices and to hold an election …"). *See also Cast-Matic Corp.,* 350 NLRB 1349, 1359 (2007); *The Guard Publishing Company*, 344 NLRB 1142, 1146 (2005); *T-West Sales & Service, Inc. d/b/a Desert*

Toyota, 346 NLRB 118, 121 (2005); *Hialeah Hospital*, 343 NLRB 391, 395 (2004); *Aqua Cool*, 332 NLRB 95, 97 (2000).

In confirming the Board's authority to issue a bargaining order, the *Gissel* Court precisely defined the NLRB's role. The goal of effectuating employee free choice must be carefully balanced with the goal of deterring employer misconduct. In that regard, the Board, before issuing a bargaining order, must find, based on record evidence, that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order . . . ." *Gissel*, 395 U.S. at 614-15. Thus, if, on balance traditional remedies have more than a slight possibility of erasing the effects of unfair labor practices, no bargaining order can issue. Forty-five years later, the *Gissel* bargaining order remains the exceptional remedy for the Board. The "preferred route" is to impose traditional remedies, and hold a second election, once the workplace atmosphere has been "cleansed" by those remedies. *Aqua Cool,* 332 NLRB 95, 97 (2000).

Given the recognized superiority of, and preference for, the secret ballot election, the General Counsel carries a heavy burden to justify a bargaining order in lieu of a second election. As the Second Circuit has explained:

> The issuance of a bargaining order is a rare remedy warranted only when it is clearly established that traditional remedies cannot eliminate the effects of the employer's past unfair labor practices. *See, e.g., NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 99 (2d Cir. 1985) ("[A] bargaining order is an extraordinary and drastic remedy, is not favored, and should only be applied in unusual cases."); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212 (2d Cir.

> 1980). An election, not a bargaining order, remains the preferred remedy. *See J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 153 (2d Cir. 1981). 'This preference reflects the important policy that employees not have union representation forced upon them when, by exercise of their free will, they might choose otherwise.' *NLRB v. Marion Rohr Corp., Inc.*, 714 F.2d 228, 230 (2d Cir. 1983) (citations omitted).
>
> * * *
>
> In determining the potential for a free and uncoerced election, we have emphasized that the Board must analyze not only the nature of the misconduct but "the surrounding and succeeding events in each case." *J.J. Newberry Co.*, 645 F.2d at 153. Despite the presence of "hallmark" unfair labor practices such as the discharge of employees for their union support, the presence of mitigating circumstances may still preclude the granting of a bargaining order. *See, e.g., J. Coty Messenger*, 763 F.2d at 99; *J.J. Newberry Co.*, 645 F.2d at 153.

J.L.M., Inc. v. NLRB, 31 F.3d 79, 83-84 (2d Cir. 1994). In particular, the NLRB bears the burden of explaining the insufficiency of other traditional remedies. *Id.* at 84.

The Board must carefully balance the competing interests of remedying unlawful conduct and protecting employees' freedom to choose their representatives. As the Second Circuit cogently explained in denying enforcement of an NLRB bargaining order:

> A bargaining order, however, is strong medicine. While it is designed to deprive employers of a "chance to profit from a stubborn refusal to abide by the law," *Franks Bros. Co. v. NLRB, supra*, 321 U.S. at 705, 64 S.Ct. at 819, and although it undoubtedly operates to deter employers from adopting illegal intrusive election tactics, its potentially adverse effect on the employees' § 7 rights must not be overlooked. *See Medo Photo Supply Corp. v. NLRB, supra*, 321 U.S. at 688, 697-698, 64 S.Ct. at 835, 839-840 (Rutledge, J. dissent). That section protects the right of employees to join or refrain from joining labor organizations. And that right is implemented by § 9(c)(1) which provides for representation elections by secret ballot. Since a bargaining order

> dispenses with the necessity of a prior secret election, there is a possibility that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees, and thus frustrate rather than effectuate the policies of the Act.

NLRB v. Flomatic Corp., 347 F.2d 74, 78 (2d Cir. 1965).

Accordingly, the Board will only issue a bargaining order in two categories of cases. *Gissel Packing*, 395 U.S. at 613-14; *see also The Guard Publishing Co.*, 344 NLRB 1142, 1146 (2005). The first is in extraordinary cases where the unfair labor practices are so "outrageous" and "pervasive" that traditional remedies would not be adequate to erase their coercive effects, rendering a fair re-run election impossible. *Gissel Packing*, 395 U.S. at 613-14. The second is in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine the majority strength and impede election processes." *Id.* at 614. The Board can only issue a bargaining order in the second class of cases where there is also a showing that, when the union requested recognition, it had majority support from the employees and traditional remedies have only the slightest chance of success. *Id.*

In the present case, the record evidence establishes that the employees are mature, experienced and knowledgeable. They had access to considerable information from many sources, not just Novelis and the Union. There was informed debate and discussion over an extended period of time. The Union and its representatives, particularly Mr. Ridgeway, are known in the Oswego community, based on their representation of employees at other companies.

The record is replete with evidence that the Company conducted a fair, lawful and fact-driven campaign. During the campaign, there was a free-flow and exchange of

ideas and information. The General Counsel's key witnesses, such as Mr. Abare, testified to the open and spirited nature of the campaign throughout the plant. *See e.g.*, Tr. 436-40, 589-95; GC Ex. 29, R. Exs. 107 and 113.

As Intervenor Richard Ferrands, Jr. ("Mr. Ferrands") testified, Novelis encouraged employees to find out the facts about unionization and base their decision on what was best for themselves and their families. Tr. 2076. Mr. Ferrands also testified that Novelis encouraged employees to vote. *Id.* Numerous employee witnesses established conclusively that Novelis provided factual details about unionization to employees, repeatedly encouraged free-will and independent evaluation, and provided assurances against retaliation. *See e.g.*, Tr. 1642, 1640-41, 1925, 2001-04, 2282, 2114, 2443, 2476; R. Exs. 47, 49, 70, and 77.[5]

It is also important to note that while the record shows wide scale campaigning, open and notorious collection of union cards, and debate, there are *no allegations* of unlawful discharge or discipline in the critical period leading up to the election. In fact, the only discipline at issue in the case is that of Mr. Abare, which occurred in April 2014, months after the election, and which has already been remedied by the 10(j) Order.

These factors support the conclusion that any unlawful conduct did not tend to interfere with the employees' freedom of choice. *See Longs Drug Stores California, Inc.,* 347 NLRB 500, 502-03 (2006) (open discussions of wages and other terms of

[5] There is also substantial evidence that Novelis applied its solicitation and distribution policies in an evenhanded, non-discriminatory manner. For example, Mr. Ferrands testified that he was reprimanded by his manager for sending two anti-union emails to the employees with whom he worked. Specifically, Mr. Ferrands testified that this manager "told [him] to stop sending the emails and not to use company equipment or time to send [the emails]." Tr. 2075. The fact that Novelis enforced its solicitation and distribution rules against pro-union and anti-union communications alike further supports the notion that Novelis conducted a fair campaign.

employment during the critical period of the election, in part, negated any inference that employer's unlawful conduct interfered with election); *Clark Equipment Co.*, 278 NLRB 498, 505 (1986) (existence of "an active and open campaign" supported Board's decision not to set aside election notwithstanding employer's §8(a)(1) violations).

Further, as the Intervenors' declarations make clear, this election was not necessarily a case of rejecting the idea of unionization, it was, instead, a rejection of this particular Union at this particular time, as established by the February election. *See* Declaration of Richard E. Ferrands, I. Ex. 2 at ¶ 8.

The fact that over 200 employees have supported the Intervenors' position and comfortably asserted that they have not been coerced, threatened or deterred in the exercise of their Section 7 rights to freely select their representative for collective bargaining, weighs heavily in favor of: (i) a finding that Novelis' conduct did not have a tendency to interfere with the employees' rights and (ii) upholding the results of the February 2014 election. See I. Ex. 2 at Ex A.

POINT TWO

The NLRB Should Reject the ALJ's Flawed Analysis and Recommendation For A Bargaining Order

The Intervenors maintain that the February 2014 election was valid and the Board should honor the results of the election. However, to the extent that the Board finds that Novelis committed unfair labor practices and imposes a remedy, a bargaining order is not appropriate. In particular, the NLRB should reject the ALJ's analysis and recommendation for a bargaining order.

A. The ALJ Misstates and Misapplies The *Gissel* Standard

There are numerous errors in the ALJ's analysis of the bargaining order remedy. First, the ALJ completely misapplies the legal standards. While he quotes the relevant case law initially, he asserts that the bargaining order is the presumptive remedy rather than the exceptional, alternative to the traditional rerun election. For example, the ALJ states "a bargaining order is warranted, absent significant mitigating circumstances, when the employer engages in the types of hallmark violations committed here. . ." ALJD at 65. This statement stands the law on its head. Rather than attempting to determine whether there is more than a "slight possibility" that a rerun election will be effective, the ALJ wrongly presumes that the bargaining order is the appropriate remedy.

In his decision, the ALJ specifically misapplies the precedent of *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980). The ALJ reads *Jamaica Towing* as a presumption of the appropriateness of a bargaining order absent significant mitigating circumstances. *See* ALJD at 65. In fact, the Court held the exact opposite. The Court, in *Jamaica Towing*, described the range of potential cases and then held that the Board may not presume employer misconduct adversely affects employee free choice. "The Board must undertake the task of investigating the circumstances thoroughly to determine the seriousness, extent and longevity of any inhibitive impact" of the unfair practices on the employees' ability to freely choose their representative. 632 F.2d at 214. Because the Board failed to do so in that case, the *Jamaica Towing* court refused to enforce the bargaining order. *Id.* at 216.

In the present case, after reviewing the Company's alleged misconduct, the ALJ clearly misapplies the controlling law. As a result, his stated conclusion is not sufficient as a matter of law to sustain a bargaining order.

Specifically, the ALJ found that Novelis' conduct "strongly suggests that the lingering effect of these violations is unlikely to be eradicated by traditional remedies." ALJD at 67. The "strong[] suggest[ion]" that traditional remedies are "unlikely" to be effective is not the applicable legal standard. Only where it is *established by record evidence* -- and not merely "suggest[ed]" -- that traditional remedies have but a slight possibility of erasing the effects of misconduct can the Board issue a *Gissel* bargaining order. *J.L.M., Inc. v. NLRB*, 31 F.3d at 83 ("a bargaining order is a rare remedy warranted only when it is clearly established that traditional remedies cannot eliminate the effects of the employer's past unfair labor practices"); *Cast-Matic Corp.,* 350 NLRB at 1359 (General Counsel failed to show that the Board's traditional remedies would be insufficient and that the "extraordinary remedy" of a bargaining order was necessary).

It is simply not enough for the ALJ to conclude that the evidence "suggests" that additional remedies and a second election would be ineffective. The ALJ's analysis gives far too little weight and value to the secret ballot election process and the sanctity of the employees' choice that is enshrined in Section 7. In evaluating the parallel issue of whether to impose a bargaining order in the Section 10(j) federal court action, Judge Sharpe cogently identified the potential irreparable harm that would arise from a decision to overreach and award a bargaining order where none was warranted.

> [I]f there were no ULPs, or violations were mild in nature, and/or a majority of the employees did not intend to authorize the Union to

> represent them, a bargaining order is inappropriate and the employees in the unit should not have the Union thrust upon them.

Ley v. Novelis Corp., 2014 U.S. Dist. LEXIS 123059, at *17. In contrast, by its own terms, the ALJ's decision does not meet the rigorous *Gissel* standard for issuance of a bargaining order.

B. The ALJ's Analysis of the Alleged Violations and Their Impact Is Misguided and Not Supported by the Record Evidence.

In addition to his legal errors, the ALJ's analysis of the alleged violations and their impact on employees is seriously flawed.

For example, with respect to the alleged threats of plant closing, the ALJ's determination that the Company committed a "hallmark" violation when it threatened plant closing and loss of business during the captive audience meetings is not supported by the record.

First, in making his determination, the ALJ took various statements of Company representatives out of context. He also selectively considered certain aspects of the speeches, while ignoring others. In doing so, the ALJ came to the erroneous conclusion that employees would be coerced in any future election by the threat of plant closure and loss of business. However, when one examines the statements in context, it becomes clear that the Company did not threaten closure or loss of business, and the employees could not have suffered coercive effects from those remarks. In citing excerpts from the captive audience meetings, for example, the ALJ unjustifiably ignores the following statements made by CEO Philip Martens and Plant Manager Chris Smith:

- "We now have a commitment in this plant and in this community that secures your future today, tomorrow, and your family's future." GC Ex. 43 at 6:6-6:9.
- "It's about the fact that we've invested $400 million in this facility. Where else in this area for years have you ever seen that same sort of confidence invested in a company to guarantee jobs, to guarantee security … It's about growth. Two hundred plus jobs already announced…" GC Ex. 6 at 10:14-10:23.
- "This is really only the beginning, and hopefully you've over time understood a little bit of what we've been saying in terms of opportunities that lie ahead for us once we're successful in delivering the material for the launch of this program. The recent $200 million announced in December for a third CASH line brought the total to over $400 million to be invested in Oswego announced over the last three or four years. Where else can you look at any other industry in this part of the world that even comes close to demonstrating that sort of support; to guarantee that sort of an opportunity, to be on the edge of cutting technology that will have such an impact on the future of this organization, as well as the customer base that we're going to be supplying." GC Ex. 6 at 16:21-17:10.
- "…the future is more secure today that it's ever been for all of you and all of your families …" GC Ex. 43 at 11:14-11:16.
- "…and nobody can deny that your future and your family's future are more secure today than they have ever been." GC Ex. 20 at 5:4-5:6.

These repeated comments about a secure future and the growth and expansion of the Oswego facility undercut any notion that the employees would conclude from those speeches that Novelis threatened plant closure or a loss of business.

Furthermore, as was demonstrated during the hearing, the speeches were made in the context of consistent communications from Novelis relaying factual information about the bargaining process, historical facts about unionization at other Novelis locations, and encouraging employees to become informed and do what is best for themselves and their families. Tr. 2004, 2017, 2036, 2076, 2107-08, 2168, 2438, 2500, 2559-60, 2703-04, 2751, 2787, 2795, and 2927. Thus, the captive audience speeches, when viewed in their entirety and in the context of the campaign as a whole, do not support the ALJ's conclusion of a "hallmark" violation that would preclude a future rerun election.

Second, the cases cited by the ALJ when considering the severity of the alleged unfair labor practice are inapposite. For example, the ALJ cites to *Aldworth Co.*, 338 NLRB 137 (2002), for the proposition that the threats of plant closing and loss of business will "likely remain etched in employees' memories for a long period." ALJD at 65. However, the threats of plant closing and loss of business in that case were far more egregious than any statement in the present case. In *Allworth*, the employer (1) reminded employees that Dunkin' Donuts, its principal customer, could cancel its contract with the employer for any reason with 30 days' notice; (2) described a hypothetical scenario where the union is voted in, costs increase, Dunkin' Donuts terminates the contract, and the employees lose their jobs; (3) informed employees that Dunkin' Donuts' historical response to union labor costs was to cancel those contracts;

and (4) informed employees that the company's relationship with Dunkin' Donuts began when Dunkin' Donuts turned to the company to escape paying the higher rates that it was facing with its newly unionized provider. *Aldworth*, 338 NLRB at 142-44. *See also*, *Homer D. Bronson Co.*, 349 NLRB 512 (2007), in which the Board relied, *inter alia*, on employer statements that two of its facilities had closed because the company was "fed up and tired of strikes," and that over the past 15 years, 13 local unionized companies had closed because of the union. It is evident that the conduct exhibited by the employers in *Allworth* and *Homer D. Bronson Co.* is far more egregious than the behavior of Novelis during the campaign.

The ALJ also completely misconstrues the impact of the asserted grant of benefits claim. The record evidence establishes that the issue of Sunday premium pay had been discussed on and off for several months in 2013. *See* ALJD at 9. The ALJ rests his conclusion that the benefit has been eliminated and "restored" entirely on one word in the Company's document (ALJD at 47, lines 17-19), without any proof that the change which had been discussed in December was in fact implemented, or that any employee was impacted by the asserted change. Most significantly, the ALJ fails to consider that, even if this conduct is deemed a restoration of premium pay, it is a return to the status quo ante and, significantly, it occurred, before the "critical period" of the NLRB election process (*i.e.*, before the election petition was filed with the Board). The ALJ gave no consideration to this significant factor in evaluating the impact of any unfair labor practice. *See J.L.M., Inc.*, 31 F.3d at 86 (fact that 8(a)(3) discharge occurred before critical period supported court's refusal to enforce bargaining order).

Likewise, the demotion of Mr. Abare, the sole 8(a)(3) claim, which occurred two months after the election, is hardly comparable to the Section 8(a)(3) violations in other cases, even in those cases in which the "hallmark" violations were not deemed to be sufficiently severe as to impact the likely fairness of a rerun election. *See, e.g.*, *Desert Aggregates*, 340 NLRB 289, 289 (2003) (no bargaining order despite the layoff of two leading union supporters) and *Phillips Industries*, 295 NLRB 717, 718-19 (1989) (no bargaining order in spite of the employer's unlawful discharge of two union supporters). In this regard as well, the ALJ failed to analyze the impact of the 10(j) injunction which, by September 2014, had resulted in the public reinstatement of Mr. Abare to his prior post. It is significant that throughout this time period, Mr. Abare was an active employee present on site, and openly advocating for the Union, as the ALJ acknowledged. The ALJ's analysis is woefully deficient and unreliable because he ignored all of these highly relevant factors affecting the employees' ability to choose their own representative.

In addition, the fact that the ALJ labeled certain conduct as "hallmark violations" is not controlling. The Board and the courts have repeatedly held that the commission of "hallmark" violations does not necessarily require the imposition of a bargaining order. *See Aqua Cool,* 332 NLRB at 97; *Abramson LLC*, 345 NLRB 171,176 (2005); *T-West Sales & Service, Inc. d/b/a Desert Toyota,* 346 NLRB at 122; *see also J.L.M., Inc. v. NLRB*, 31 F.3d at 83-84; *NLRB v. Jamaica Towing*, 632 F.2d at 213 ("even with respect to these 'hallmark; violations, a bargaining order may be denied"). Further, the NLRB has repeatedly refused to issue bargaining orders in many instances where the allegations of unlawful conduct were far worse than alleged to have been committed by Novelis. For example:

- The Board refused to impose a bargaining order where it found that an employer required employees to remove union buttons; prohibited employees from bringing union materials into the plant; made statements to employees that their efforts to select a union would be futile; changed its practice to prohibit certain employees from taking breaks; interrogated a job applicant about his union sentiments; and threatened an employee with job loss if the Union was selected. *See Cast-Matic Corp.*, 350 NLRB 1349, 1349-50 (2007).
- The Board refused to impose a bargaining order where it found that an employer maintained overly broad solicitation, distribution and access rules; prohibited employees from discussing wages, benefits and other terms and conditions of employment; prohibited employees from discussing the union at work; encouraged employees to revoke their authorization cards; interrogated employees about their union membership, activities and support; granted employees a wage increase; promised employees a future wage increase; and required employees to engage in anti-union activities. *See Jewish Home for the Elderly of Fairfield Cty*, 343 NLRB 1069, 1122 (2004).
- The Board refused to impose a bargaining order where the employer immediately laid off the two leading union supporters and solicited and promised to remedy employee grievances. *Desert Aggregates*, 340 NLRB 289, 289 (2003).

- The Board refused to impose a bargaining order where the employer committed a "hallmark" violation by threatening plant closure; solicited grievances; promised to remedy grievances; threatened employees with the loss of benefits if union was elected; implied that voting for the union would be futile; granted employee benefits; and improved terms and conditions of employment. *Aqua Cool*, 332 NLRB 95, 95-97 (2000).
- The Board refused to impose a bargaining order where the employer committed the "hallmark" violation of discharging the leading union supporter and made statements linking his discharge to his union activities; maintained an overly broad non-solicitation rule; coercively interrogated employees and solicited them to report on other employee's union activities; created an impression of surveillance; and coercively interrogated, solicited grievances from and impliedly promised benefits to a leading union supporter. *T-West Sales & Service, Inc. d/b/a Desert Toyota*, 346 NLRB 118, 118, 121-22 (2005).
- The Board refused to impose a bargaining order where the employer's Vice President told employees that he felt "betrayed" and "stabbed in the back" because they contacted the union; impliedly threatened employees with discharge if they engaged in union activities; engaged in unlawful surveillance; implied that it was futile to support the union; prohibited employees from remaining in the lounge after work hours in retaliation for their union support; removed employee benefits; solicited an employee to persuade other employees to withdraw support for the union by promising

him a promotion or job security; threatened to "destroy" the individual who contacted the union; and discharged the leader of the union campaign. *Hialeah Hospital*, 343 NLRB 391, 391-94 (2004).

In summary, the ALJ's analysis gave far too little weight and value to the secret ballot election process and the primacy of the employees' choice that is protected by Section 7. By its own terms, the ALJ's decision does not meet the rigorous *Gissel* standard for issuance of a bargaining order. When one considers the totality of the circumstances, which the ALJ failed to do, it is apparent that Novelis' alleged misconduct is wholly inadequate to support the conclusion that the sophisticated employees at the Oswego works would no longer be able to make a free choice on union representation.

C. The ALJ's Evaluation of Post-Election Events Is Inaccurate and Incomplete.

The ALJ's assessment of the events following the election and the change in circumstances is also fatally flawed.

To begin, the ALJ's assertions that the evaluation of whether a bargaining order is warranted is determined as of the time of the unfair labor practices and that consideration of subsequent, changed circumstances is discretionary do not withstand scrutiny. *See* ALJD at 67, line 20-25. While the ALJ relies on *Highland Plastics, Inc.*, 256 NLRB 146 (1981) and *Evergreen America Corp.*, 348 NLRB 178 (2006), the Second Circuit and other reviewing courts have repeated explained that the evaluation of the appropriate remedy must occur as of the time of the NLRB's decision and that changed circumstances must be evaluated in determining the potential for a free and

fair second election. For example, in *JLM, Inc. v. NLRB*, the Second Circuit clearly stated: "We have emphasized that the Board must analyze not only the nature of the misconduct, but the surrounding and succeeding case events in each case." 31 F.3d at 84. See also *J.J. Newberry Company*, 645 F.2d at 153; *NLRB v. J. Coty Messenger Servs., Inc.*, 763 F.2d 92, 100 (2d Cir. 1985) (a bargaining order is proper only if, after reviewing all relevant circumstances, including the nature of the employer's misbehavior and any later events bearing on its impact on the employees, the Board reasonably concludes that the employees will be unable to exercise their free choice in an election); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1170-71 (D.C. Cir. 1998) ("we have repeatedly instructed the Board to determine the appropriateness of a *Gissel* bargaining order in light of the circumstances existing at the time it is entered"); *Somerset Welding & Steel v. NLRB*, 987 F.2d 777, 781 (D.C. Cir. 1993) (finding no justification for a bargaining order where the Board did not adequately consider changes since the time of the election). In light of this clear federal court direction, the Board has acknowledged that it merely invites an appeal and further litigation if the Board were to apply a contrary standard. *See Homer D. Bronson, Co.*, 349 NLRB 512 (2007) (the Board declined to issue a bargaining order because the federal courts would not enforce such an order under the circumstances of the case).

Here, while the ALJ evaluates some post-election conduct, his analysis is incomplete and unpersuasive. For example, he relies on sound bites from the pre-election speeches of Plant Manager Smith and CEO Martens, taken out of context, to support his claim that "this violation . . . will likely remain etched in employees memories for a long time" (ALJD at 65, line 43), but the ALJ dismisses the subsequent written

statements from the same Company officials in which they responded to the Union's charges challenging their pre-election statements as threatening. Mr. Martens and Mr. Smith clarified for the record that they had no intention of threatening employees in any regard. For example, CEO Martens wrote:

> [T]o eliminate any possible misunderstanding or misconception, let me be absolutely clear on these important points:
>
> - I did not and would never make any threats to close the Oswego plant based on the results of a union election. We have invested over $400 million into the future of the Oswego Works with $250 million more of investment underway. We have added nearly 400 new jobs and intend to create 250 more new jobs going forward. When I mentioned the closure of our plant in Saguenay, it was simply to emphasize the commitment to the Oswego plant by allocating Saguenay's production to Oswego Works. I hope this provides clarity and eliminates any confusion or possibility that a negative inference could be interpreted from my comments.
>
> - I did not and would never make any threats of job loss or loss of wages or benefits based on the results of a union election. As we stated repeatedly during the weeks leading up to the election, no one can predict the results of good faith bargaining.

R. Ex. 56; *see also* R. Ex. 54 and Tr. 2113-14, 2281-82, 2443-44, 2459-60, 2477-78.

To devalue the Company's clear, written assurance to employees, the ALJ wrongly analyzes the statements under the NLRB's standard for repudiation as a defense in the unfair labor practice proceeding (ALJD at 68), when, in fact, the issue to be evaluated is whether any lingering effects of the pre-election oral comments could be

fairly interpreted by employees and whether they would impact the employees' ability to vote in a second election without coercive effect.[6]

The ALJ also wrongfully gives short shrift to the implications of the Company's compliance with the 10(j) order. In September 2014, Plant Manager Smith read the District Court's 10(j) injunctive order to the entire bargaining unit at a series of meetings. Novelis also established, for the record, full compliance with the terms of the 10(j) injunction including full reinstatement of Mr. Abare, suspension of its Social Media policy, and publication of the Order at numerous locations throughout the plant. As the ALJ noted, this re-established the status quo ante. ALJD. at 68. As such, it is strong evidence that the Board's traditional remedies will allow for the free exercise of employee choice in a rerun election.

The ALJ's assertion that the 10(j) injunction "does not actually remedy unfair labor practices" (ALJD at 68, line 38) is absurd. As a result of the 10(j) order, Everett Abare was reinstated to his former position and this action was publicly announced to all bargaining unit employees. *See* footnote 3, *infra*. Further, 20 of the 21 paragraphs[7] in the cease and desist order that the General Counsel seeks in this proceeding and that the ALJ has recommended have already been imposed on Novelis by the federal court. They have been read by the Plant Manager to all employees and remain posted

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[6] *DirectTV*, 359 NLRB No. 54 (2013), relied on by the ALJ, did not involve a bargaining order issue. *Astro Printing Services*, 300 NLRB 1028 (1990) did not apply the repudiation defense standard and is distinguishable because, here, the subsequent statements were timely – while the issue of union representation was still hotly debated among employees, and were not accompanied by any other alleged unfair labor practices.

[7] Judge Sharpe refused to issue a bargaining order and so the paragraph requiring recognition of the Union is not contained in his Order. *See Ley v. Novelis Corp.*, 2014 U.S. Dist. LEXIS 123059, at *18-22 (N.D.N.Y. Sept. 4, 2014).

throughout the Oswego facility. The powerful impact on the employees of this authoritative action by the federal court cannot be ignored.

The 10(j) injunction is also highly probative on the issue of whether or not the asserted unlawful conduct will re-occur. In the face of a federal court order and potential contempt proceedings, it is extremely unlikely that any violations will re-occur pending the resolution of the NLRB adjudication and election process. The ALJ gave no consideration to this compelling factor in favor of a second election.

Finally, and perhaps the most significant flaw in the ALJ's analysis comes with a broader perspective of the facts in this case. The record establishes that this was a hotly contested election with significant debate among pro-union and anti-union employees. The debate occurred at the workplace and even at meetings called by the Union. The Intervenors, among others, staunchly opposed the Union based on their experience, particularly their concerns about the Union leadership and its conduct at other plants in the Oswego area.

The ALJ completely ignores this context in his decision. He fails to give credence or consideration to the ability of the employees to make informed decisions in their own best interests. The record evidence of the perjury committed by Union officials in this case[8] is a precise example of the concerns about the Union leadership that the Intervenors and others expressed during the election campaign.

The General Counsel, like the ALJ, also misconstrues post-election events. The General Counsel argues, without factual support, that the passage of time and the

[8] *See* ALJD at p. 10, note 22, and at p. 12, note 29; *Ley v. Novelis Corp.*, 2014 U.S. Dist. LEXIS 123059, at *10, note 3 (Ridgeway's affidavit "was not accurate;" the Regional Director "has all but admitted a fabrication or embellishment by Ridgeway.")

impact of Novelis' conduct will erode support for the Union. It is more probable and factually grounded, that support for the Union waned because the Union refused to accept the results of the election process. It was the Union which initiated the NLRB proceeding which culminated in the February election. The Union had the ability to block the election if it believed that a fair election could not be held (*see* NLRB Casehandling Manual at ¶ 11730.2, *Columbia Pictures Corp.*, 81 NLRB 1313, 1314 (1949); *Carson Pirie Scott & Co.*, 69 NLRB 935, 938–939 (1946)); and, according to the General Counsel, the Union was well aware of its eroding support. See Petitioner's 10(j) Brief at pp. 18-19; Case No. 5:14-cv-00775, Dkt. No. 1-3. Instead, the Union chose to proceed and, only after it lost the election, abandon the election process in favor of recognition by government fiat. It is reasonable that employees, who maintain that they made an informed choice in a fair election, do not want to be represented by a union that will not accept the results of the democratic process.

Taken as a whole, it is clear that the employees have the capacity to make an informed self-decision and should be allowed to do so. Either the Board should certify the results of the February 2014 election, or alternatively, it should issue a cease and desist order and schedule a second election. Any other result would be a travesty to the principles of the National Labor Relations Act.[9]

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[9] The Board, on occasion, has bolstered its decision to issue a bargaining order by asserting that after a reasonable time, if the employees no longer want the union as their representative, they can pursue decertification. *See Milum Textile Services Co.*, 357 NLRB No. 169 (2011). Such an argument significantly undervalues the employees' statutory self-determination rights which may be extinguished for up to three years under the Board's contract bar rule if the parties negotiate an agreement. S*ee General Cable Corp.*, 139 NLRB 1123 (1962). It would also give the Union exclusive control over the employees' wages, benefits, and other terms and conditions of employment. Given the clear divide among the Novelis employees and the established fear of *union retaliation*, installing the Union as the exclusive representative would create a substantial risk that, in the give and take of the collective bargaining

D. The ALJ's Conclusions Regarding the Union's Card Majority Cannot Withstand Scrutiny.

A separate and necessary prerequisite to the ALJ's recommendation for the issuance of a bargaining order is his conclusion that the Union established majority status through its authorization cards. *See* ALJD at 63. *NLRB v. Gissel Packing,* 395 U.S. at 614-15 (the Board may only issue a bargaining order if "the possibility of erasing the effects of past practices [through traditional remedies] is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order . . .").

While the ALJ found that the General Counsel had authenticated 351 cards (ALJD at 63), his analysis is perhaps the weakest, most questionable aspect of his decision. Essentially, the ALJ relied on the words written on the card and his eyeballing of the employees' signatures, regardless of perjured testimony, misrepresentations, credited security records that the solicitor was not on site when the card was signed, and a host of other conflicting testimony over the process by which cards were obtained.

For example, the ALJ found:

- The testimony of what employees said or were told during the solicitation of cards "did not overly impress" and consisted of "short, rote responses" rather than the true conversations. ALJD at 64, lines 9-13.

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process, the interests of those who oppose the Union would be ignored or traded off to bolster the interests of union adherents.

- The General Counsel's witnesses did not possess the most accurate recollection as to when they signed or witnessed a card being signed. ALJD at 64, lines 31-32.
- Employees who solicited cards did not witness the signing of the cards that they claimed to have witnessed. ALJD at 64, lines 38-39.
- Solicitors stated that the cards would be used to get more information or get an election. ALJD at 64, lines 46-47.
- The testimony of Union Officer Jim Ridgeway was impeached; he was not certain as to the dates when cards were signed, and he misrepresented that he witnessed a card signing. ALJD at 12, n. 29.
- Mr. Abare signed as a witness to cards that were solicited by others. ALJD at 13, n. 32.
- Chris Spencer averred that some employees signed cards to stir the pot and send a message to management. ALJD at 14, n. 35. Spencer was not entirely credible. His testimony was contradicted by company security records which the ALJ found to be reliable and accurate. ALJD at 14, n. 36.
- Company security records established that employees were not in the facility when they testified they signed cards while at work. ALJD at 16, notes 44 and 46 and at 20, n. 63.
- Justin Stevens told coworkers that the cards were only for the purpose of getting more information about the union. ALJD at 20, n. 62.

Yet, despite these findings, the ALJ credited the cards as authenticate representations of the employees' true desire for union representation.

Again, the ALJ misapplied the *Gissel* standard. On this issue, the Board is obligated to determine that, on balance, employee preference for or against the union would be better determined based on the cards as compared to a rerun election. *Gissel*, 395 U.S. at 614-15. The ALJ engaged in no such comparison. In particular, he gave no weight to the horrific deficiencies in the testimony regarding the authentication of the cards as they compared to the likely value of a second election, with fair recognition that cards are "admittedly inferior to the election process … ." *Id.* at 603.

In addition to the deficiencies credited by the ALJ, a review of the record reveals that the process of authenticating the cards was so tortured and fraught with uncertainty that no objective person could reasonably conclude that the cards are the best and only measure of employee sentiment. During seven painfully laborious, leading and chaotic days of the hearing, it was revealed that:

- The General Counsel pre-selected over 58 cards (GC Ex. 28) from among several hundred for a key witness, Everett Abare, to identify and authenticate (Tr. 309-12, 329, 331-37, 343),[10] and what followed was a protracted farce of a spectacle with the General Counsel desperately attempting to establish the authenticity of cards as to which Mr. Abare had no recollection (Tr. 329-435);

[10] Judge Rosas summed up the inadequacies of the General Counsel's attempted proof: "There's been a lot of holler-ballo about the suggestiveness of these documents, and whether it is or it isn't[,] the witness has gotten wind that that's an issue. And, you know, that creates a cloud over this approach at this time." (Tr. 334-35).

- Witnesses believed that the union cards were for purposes of "showing a willingness to, you know, have a vote" (Tr. 832), "get the vote for the Union" (Tr. 862) and otherwise obtain an election (Tr. 539, 604, 605);
- Witnesses testified that they "didn't really understand what this was about" (Tr. 864), that employees signed cards just to stir the pot and send a message to management (Tr. 963), and that employees did not read the cards before signing them (Tr. 541);[11]
- Witnesses had not previously met, and did not know, the individuals who claimed to be Novelis employees and signed cards at public meetings (Tr. 201-04);
- Cards were mis-dated (Tr. 217, 218, 238, 547-48, 817, 875 899, 900), or not dated at all (Tr. 127);
- Numerous cards were signed after the Union sought recognition (GC Exs. 15, 28, 31, 44, 45, 47, 54, 68, 70, 71, 75, 98, 99, and 104);
- Witnesses could not recall relevant information about the time place and manner of the signing of cards, including when and where they signed their own cards (Tr. 811-12, 813, 814, 815-16, 818, 819 851 881-83, 969-70, 975, 977, 982);
- Witnesses could not recall the conversation that occurred at the time the cards were signed (Tr. 851);
- Witnesses could not identify copies of cards (Tr. 801);

[11] The Supreme Court has explained that employees should not be bound by a signed authorization card if their signatures were procured through "words calculated to direct the signer to disregard and forget the language above his signature." *Gissel Packing*, 395 U.S. at 606.

- Witnesses could not establish to whom signed cards were provided and other chain of custody issues (Tr. 801, 804);[12]
- Witnesses had numerous other lapses in memory and other difficulties in authenticating cards (Tr. 239-40, 327-28, 803-04, 847); and
- Ultimately, the General Counsel gave up trying to authenticate the cards and turned over dozens of cards and handwriting samples to Judge Rosas so that he could examine them and attempt to determine their authenticity (Tr. 1511-12, 3173-75; GC Exs. 71, and 249-270).

The totality of the evidence and the systemic unreliability of the evidence relating to the Union authorization cards stand in stark contrast to the secure, reliable and definitive nature of the Board's election process. It is simply inconceivable, on a review of the hearing record in this case, to conclude that the proof of a showing of interest is so superior to a secret ballot election, as a matter of law and policy, that a remedy predicated on that showing is the sole appropriate remedy and that no traditional remedies culminating in a second election would be viable.

[12] Judge Rosas explained his concerns on the second day of hearing:

> With all due respect this is a union organizing campaign in which cards are being collected at different times by different people. . . I mean, this is not something that would even come close to passing muster on a chain of custody test in a criminal case." (Tr. 342).

CONCLUSION

In the February 2014 election, the Intervenors, as well as a majority of their co-workers, validly exercised their rights under Section 7 to vote against representation by the Union. Issuance of a bargaining order in this case would be improper because it would violate the statutory rights of the Intervenors, as well as the majority of their co-workers, to refrain from union representation under Section 7 and to exercise that right through the NLRA election process. This right, to choose or reject union representation, is the paramount interest protected by the Act. *Rollins Transp. Sys.*, 296 NLRB 793, 794 (1989). "There could be no clearer abridgment of § 7 of the Act, assuring employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity," than "grant[ing] exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961). Ironically, this is exactly what the General Counsel is seeking to do in this case – set aside the results of a fair and valid election and impose upon employees the very union they rejected in that election. The Board should not upset this democratic process by forcing the Union upon the employees now.

We respectfully request that the Board uphold the results of the secret ballot election conducted in February 2014, during which the Novelis employees exercised their free choice and voted against union representation. Alternatively, if the Board were to find violations of the Act or objectionable conduct sufficient to set aside the February 2014 election, it should conduct a second election. There is absolutely no

reason why the Novelis employees should have union representation forced upon them when, by exercise of their free will through a re-run election, they may choose otherwise.

Respectfully submitted,

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